PROBLEMS WITH
LETTERS OF INTENT

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# PROBLEMS WITH LETTERS OF INTENT

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PROBLEMS WITH LETTERS OF INTENT

Letters of intent are a source of confusion, mystification and acrimony. Neither party is usually sure whether it wants to be bound when it signs, but later one of the parties wants the other to be bound. What starts out as an undertaking founded on honor and good faith ends as a contract foundering on judicial interpretation of the single question: "Is it enforceable?"

Letters of intent are composed in a fluid and changing process of identifying issues. By contrast, the traditional offer/acceptance process requires a binary response: "This is it. Take it or leave it. All or nothing." Alert to these issues, the drafter can shape the letter so that the distinction can be drawn between enforceable provisions and precatory provisions, and open issues and closed issues.

Though the parties ordinarily start with the premise that the letter is not binding, the balance of this discussion will examine that premise. When reviewed closely there are a number of issues that both parties expect should be enforceable as to the letter itself, rather than as to the proposed business transaction. So the seller might say "There is no point in continuing if we can't agree on price" but in reality, the parties may not want to categorize price as a binding provision if they believe it may be changed based on the final negotiation of other issues, or if they do not want to trigger the risk that the letter itself will be the enforceable contract. As a result they are compelled to address the fundamental issue: what is the purpose of the letter.

I. CHOOSING THE PURPOSE

If the parties can agree upon the purpose of the letter, they can avoid the distress of trying to clarify their respective positions after those positions have changed. In letters, certain provisions may be intended to be enforceable, and others not. Distinguishing between them is crucial to achieving an expected result.

A. Purposes

1. a fully binding contract with all essential elements reflected.

2. To preserve a period during which the parties must negotiate to attempt to reach agreement with either good faith, best efforts, or some other manifestation of undertaking with honor. Courts have generally split on enforcing "agreements to negotiate," some claiming they fail for indefiniteness, others willing to let a cause of action stand for claims that the other side did not make every reasonable effort to agree on a contract.
3. A timetable and list of conditions for achieving a formal agreement.\textsuperscript{7}

4. Ground work for exploratory discussions that are not exclusive, but which establish a seriousness of undertaking and result in identifying the issues to be resolved for a contract to be drafted; to be binding as to the resolved terms and non-binding as to the open terms.\textsuperscript{8}

5. A trial balloon to be almost completely unenforceable, intended simply to see whether more senior personnel who can exercise approval are willing to let negotiations commence.

B. Effect

1. To provide a map of the terrain of the deal, with sign posts of the more important overviews.\textsuperscript{9}

2. To speed negotiations by synopsizing and elevating negotiating points.

3. To provide consultants with a brief outline of the deal, so that the principals can be advised early in the negotiations about issues which can turn the direction of a deal.

4. To clarify complex issues, identify important points for all parties to consider, establish binding assumptions on which the continuation of the negotiation is based, and close open issues.

C. Reflecting the Purpose. The goal of the letter can best be achieved by a clear statement of the intent.

1. Is it intended to cover all material points, notwithstanding that there may be other important issues which are not covered?

2. Is it to preserve the right to terminate if specific conditions are not met, or certain terms are not resolved?\textsuperscript{10}
3. Must the parties continue to negotiate if there are changes in circumstances, the so called "hardship clause" or for market changes, the so called "market out"?

II. INTENT AND CONSIDERATION For the letter to be binding, it must show both intent and consideration.

A. Intent to have Contractual Effect

1. Fact Question: Whether a contract is created is based on external circumstances and manifestation; it is not based on the actual state of mind of the parties.11

2. Statement of Intent: The general rule is that the language in the letter will determine the intent of the parties.12 There are several cases, however, which stand for the proposition that parties will be bound, notwithstanding the express language of a letter that states it is not binding. An extreme example is in Arnold Palmer Golf Co. v. Fuqua Industries, 541 F.2d 584 (6th Cir. 1976) which held that a memorandum could be binding because it showed a general agreement between the parties, had extensive and sophisticated provisions, and contained the essential elements required for a contract, notwithstanding that (i) it was titled "Memorandum of Intent", (ii) it was missing some contractual elements, and (iii) it included a provision stating:

"(11) Conditions. The obligations of Palmer and Fuqua shall be subject to the fulfillment of the following conditions:
(I) Preparation of a definitive agreement for the proposed combination in form and content satisfactory to both parties and their respective counsel;
(II) Approval of such definitive agreement by the Board of Directors of Fuqua."

3. Completeness: if all of the material elements are present, even if some important elements are missing, the circumstances suggest intent to form an enforceable obligation.13
4. **Format**: it exhibits a "contractual effect" by including conclusionary rather than precatory language\(^\text{14}\) being more sophisticated than an ordinary writing, or by being written in a stiffer and more legalistic jargon, or including legalistic boiler plate language such as "IN WITNESS WHEREOF" and other affronts to plain language.

5. **Tests**: The order of significance in analyzing whether the letter has contractual effect is usually:\(^\text{15}\)
   
   (a) does it contain an express statement by the parties.\(^\text{16}\)
   
   (b) did one party perform based on the terms of the letter or on that party’s reliance that the letter would reflect the performance.\(^\text{17}\)
   
   (c) are the essential terms of a contract included, permitting the conclusion of an implied contract-in-fact.\(^\text{18}\)
   
   (d) does it contain formalities and other displays of solemnity which are customary for contracts.\(^\text{19}\)

B. **Consideration and Discretion**.

1. Where one party either diminishes its own position or enhances the other party’s position in exchange for a promise (Restatement (Second) of Contracts Section 75 (1981)): exchange of promises, reliance, partial performance.

2. Where one party has an exclusive right of discretion to proceed (in the case of a buyer for example, where there is an unfettered inspection right, and in the case of a seller for example, where there is an unfettered approval right by the board of directors), there is a threat that the exclusive discretion prevents the existence of consideration. If the party enjoying the discretion (usually the buyer) is performing diligence or undertaking other costs which diminish its own position, even if they do not enhance the other party (seller’s) position, consideration likely emerges because of the diminution
incurred by the performing party. Similarly, and even more so, partial performance of the subject matter of the letter would act as consideration.

III. **SEPARATING BINDING AND NON-BINDING PROVISIONS.** Ordinarily, even where portions of the letter of intent are clearly not binding, there may still be important ancillary matters which are binding.\(^\text{20}\)

A. **Intent:**

1. Stated intent is still the strongest evidence of empirical intent.\(^\text{21}\)

2. If the intent is to prepare a letter which is not intended to be enforceable in any regard, except for the statement of intent itself, it should so state that.

B. **Exclusivity:**

1. A party may be liable for fraud who is conducting parallel negotiations but misleads the others that the negotiations are exclusive.

2. A disclosure of non-exclusivity, or a waiver, would provide a strong defense.

3. If the seller intends to be limited in its rights to negotiate with others, the parties can agree that the seller will not enter into parallel negotiations with another prospect during the negotiation period. Because some courts have found exclusive negotiation provisions which lack a time limit to be too indefinite and therefore unenforceable, drafters should seriously consider including time limits. Other alternatives are non-refundable payments for specific durations of the exclusive period, rights of first refusal, increase purchase price for extensions of the non-exclusive, proof of payments to third parties in transaction related matters, or other interim achievement standards.
C. **Good faith:** The requirement to negotiate in good faith is usually written.22

1. Distinguish whether the parties are to use best efforts to achieve a final agreement or simply to negotiate the issues in good faith.23

2. Establish whether the resolution of specific points should or should not result in the creation of a contract.

3. Establish that no contract exists during the prelude to that resolution.24

4. The common law good faith requirement may apply to the contract only, or to the negotiations that precede the contract, or to the negotiations that precede the letter of intent if the letter has a contractual effect.25

5. The requirement of good faith negotiation would include:

   (a) sincere effort.

   (b) continuousness.

   (c) diligence in the negotiation.

6. Examples of bad faith, which the commentators call "culpa in contrahendo" include:

   (a) unjustifiable refusal to negotiate.26

   (b) insistence on improper or unreasonable conditions.

   (c) illegal, unethical or otherwise improper negotiating tactics.
(d) misrepresentation or non-disclosure of assumptions fundamental to the commencement of the negotiation.

(e) re-opening closed issues.

(f) repudiation.

7. Negotiating the good faith duty:

(a) The right to terminate negotiations at any time for any reason would negate the expectation, or common law duty, of having to continue to negotiate.

(b) An express statement that the cessation of negotiations, the failure to resolve open issues or compromise, the failure to provide disclosure of information which may later be considered material, or the termination of the letter does not expose either party to liability.

(c) Express acknowledgement that each party proceeds at its own risk, and that it knowingly intends to bear its own costs if negotiations cease for any reason should buttress the disclaimer.

D. Confidentiality:

1. Exposures

(a) secret business strategies.

(b) innovative ideas.

(c) other proprietary information.

2. The elements of the confidentiality clause
(a) duration and survival after the termination of the letter.

(b) subject matter of the protection - non-public or separately obtained information.

(c) the class of recipients - buyer, its employees and consultants, lenders and their consultants, regulators and other approval parties.

(d) standard of care - the same standard as the party's own confidential information, the same standard as applied to confidential information of other parties, individual acknowledgements by employees to be subject to standards.

(e) limitation on use of confidential information - evaluation of prospective acquisition.

3. Cause of action: breach of contract express or implied-in-fact, more commonly tort for misappropriation or conversion, with a remedy in damages for the breach, or injunction for the tort to prohibit further use or dissemination.

E. Indemnifications:

1. Where one of the parties is engaged in conduct which could cause the other party liability,

   (a) use or inspection of the real estate.

   (b) negotiation with other parties having an interest in the asset.

   (c) interaction with the occupants.

   (d) inquiry of governmental authorities.
2. Elements of an Indemnification Clause:

(a) duration and survival based on when claim is made or occurrence of claim.

(b) indemnified events - known, unknown, later discovered.

(c) notice to exercise indemnification.

(d) indemnified parties/indemnifying parties.

(e) standard of indemnification.
   i. protect (proactive), defend (reactive), hold harmless (make whole)
   ii. selection of counsel
   iii. veto of settlement

(f) recourse
   i. creditworthy indemnitor
   ii. set off right
   iii. escrow/bond/letter of credit
   iv. non-cash collateral
F. Approval: A duty to negotiate in good faith has been distinguished from a duty to pursue approvals or advocate the negotiated transaction.

1. If the letter is a precursor to the negotiation of a contract, the parties should make clear whether the letter is intended to act as the approved contract after approval (as is usually the case in applications for long-term loans which convert to commitments upon approval), or whether approval is simply approval of the letter, which in turn must be elaborated into a contract. Some cases ignore the chain of approval if one approval in the chain is achieved.

2. Subject approval process to a time limitation by a test for when approval has been gained or lost.

3. The effect of refusal or non-approval in a timely fashion.

4. The letter may also specify the standard for the parties who pursue the approval process:

   (a) submit the letter with a request for approval

   (b) supporting efforts to obtain the approval

   (c) continuous and diligent pursuit of the approval until it is obtained or refused

   (d) regular advice to the other party of the status of the approval process

   (e) use of the most efficacious and expedient procedures to obtain approval
G. Expenses:

1. Each party would be expected to pay its own legal fees, except for the expense of conducting enforcement of the letter; with that expense to be paid by the loser.

2. Expenses related to due diligence are typically borne as the expense of the investigating party, but if discussions terminate and the results assigned to the investigated party, the investigating party may look for reimbursement of some or all of the expense of the investigation.

3. Another way of allocating risk would have the terminating party pay the non-terminating parties costs (which could be limited by amount and/or source) conditioned upon termination other than for permitted reasons.

H. Limited Liability:

Allocating expenses can also be the means of creating limited liability for terminations with or without cause. As such, it becomes an effective defense to claims of partial performance and reliances creating enforceability. Without limited liability, the encouragement by one party for the other party to act increases the liability of the encouraging party by inducing a partial performance and change of position.

I. Legalistic Language: Though several types of provisions are sophisticated and formal in nature, the benefits of including them probably should be considered in certain instances.

a. Choice of Law - if courts of one jurisdiction are more favorably predisposed to interpret a letter in the way that the parties would seek.

b. Merger - as to the binding provisions to avoid parol evidence.

c. Sunset - to establish finality for the parties to terminate by a date certain if the negotiations have not succeeded by then.
d. Notice - for proper delivery, address and representatives.

J. Remedies: Several remedies are available to protect these parties' interests:

1. awarding a sum of money due under the contract or as damage,
2. requiring specific performance or enjoining its non-performance,
3. requiring restoration of the subject matter to prevent unjust enrichment,
4. awarding of a sum of money to prevent unjust enrichment,
5. declaring the rights of the parties and enforcing an arbitration award,
6. if the conduct constituting the breach is also a tort, punitive damages.

K. Damage calculations

1. "expectation interest" which is a buyer's interest in having the benefit of the bargain by being put in as good a position as the buyer would have been had the contract been performed

2. "reliance interest" which is the interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as the buyer would have been had the contract not been made.

3. "restitution interest" which is the interest in having restored to the buyer any benefit that the seller has conferred on another party.
IV. NON BINDING PROVISIONS

Non-binding provisions are ordinarily those terms which continue to be negotiated during the course of the transaction. Therefore they would include price, which in the case of a purchase or lease, is usually the first provision to be established: how much is to be paid, when it is to be paid and are there reductions if the payor pays expenses which the payee might otherwise be expected to pay, such as broker commissions, transaction taxes, permit fees. Though the price may be considered a binding provision, it is frequently affected by other costs, which makes it non-binding as a practical matter, such as costs for required improvements, repairs or maintenance, costs for governmental approvals, the valuation of receivables and payables attributable to the ownership. Other typical provisions which may seem to lend themselves to simple description but are subsequently made more uncertain include provisions dealing with the scope and duration of diligence inspections, because they are in effect, qualified by the representations and warranties. An example of provisions which are rarely resolved as binding largely for lack of sufficient definition, include operating covenants, radius restrictions and other non-competes, exclusive rights and uses, and issues of common usage which are usually treated in restriction and easement agreements.

The drafter’s natural instinct is to seek certainty. Indeed, each term which can be converted from a non-binding provision to a binding provision advances the completion of negotiations. But the desired result is frequently not met by the practical result, which is to continue ambiguity until a formal contract is signed. The final conclusion then, is that the business people will continue to expect to reserve rights to change deal points, or even change their mind; but even with that freedom, all parties should expect the framework of the negotiation, the Binding Terms as I have characterized them, will remain unchanged and enforceable obligations.
The following document is a form of Letter of Intent which is intended for purposes of demonstrating the concepts in the foregoing discussion, rather than as an example of an actual letter. The text is arranged in three type faces.

The roman type is the language an Interested Prospect would consider using.

_The italicized type is the language an Asset Owner might respond with._

_The underlined type is the language calling for fact specific information._
Dear Salutation of Addressee’s Representative:

This letter of intent ("Letter") follows discussions we have had about the interest of Name of Interested Prospect ("Prospect") in (purchasing/leasing) the Property and the manner of proceeding to agree upon a final contract. This Letter contains Binding Terms ("Binding Terms") in Section I and Non-binding Terms in Section II ("Non-binding Terms"). The main Non-binding Terms are intended to be the basis of discussions for a final, definitive and formal contract.

I. BOUNDING TERMS

Under Section I of this Letter, the following terms are agreed upon by the parties hereto with the intent to be legally bound thereby as their valid and enforceable obligations, effective as of the date provided on the signature line ("Letter Effective Date") and after all parties identified as signatories have duly executed and delivered this Letter to the other parties:
A. **Disclaimer of Agreement.** The obligations of the parties to proceed to an agreement to purchase/sell/lease the Property are subject to entering into a final, definitive and formal contract to be prepared without missing terms, authorized by the appropriate directors, shareholders or members duly executed and delivered. Except for the specific provisions identified as "Binding Terms," neither party shall have any liability to the other in connection with this letter and the transaction it describes for failure to agree upon a final, definitive and formal contract and the Non-binding Terms do not evidence any legal or equitable obligation of either party.

Either party has the right to terminate this Letter, cease negotiations, or refuse to compromise on any issue, without risk or obligation to the other party. This letter is not a contract. These are preliminary and exploratory proposals which do not represent a final agreement of the parties of the transaction. Either party may enter into negotiations with third parties. This letter is not an agreement to negotiate. The parties do not intend to be bound to negotiate in good faith or use best or reasonable efforts to reach agreement. The parties shall not be bound until a final, definitive and formal contract is signed by both of them.

B. **Contract.**

Within _____ (__) days after the addressee of this letter ("Addressee") executes and returns this letter to the undersigned (the "Interested Party"), the Interested Party shall deliver to Addressee a contract (the "Contract"). The Interested Party and Addressee agree to negotiate the terms of the Contract in good faith, and to use reasonable efforts to mutually execute and deliver the Contract by a date ("Effective Date") which is within ____ (__) days of the receipt of the Contract. If the Contract has not been signed and delivered by all required signatories within such ____ (__) day period, this letter may be terminated by either party upon written notice to the other. [Neither party shall] [Either party may] refuse to negotiate, withhold material information necessary for the other party to make an informed decision about the subject matter of the transaction, or require change in the terms previously agreed upon as the basis of this Letter. By acceptance of this letter, Addressee agrees to negotiate exclusively with the Interested Party and to refrain from offering, soliciting or entertaining offers, or encouraging or retaining offers, or negotiating with any other party for the sale/lease of the Property and the Interested Party agrees to refrain from negotiating with any other party for substitute or alternate property. Such period of
exclusive negotiations shall continue for a period of (_,) days after the date of this letter. Though Addressee shall not solicit, initiate, pursue or otherwise induce parallel or competing negotiations with respect to the subject matter of this transaction, if Addressee receives a bona fide offer from a third party that the Addressee is willing to accept, Addressee will deliver a copy of the offer to the Interested Party and permit the Interested Party to agree to match that offer within (_,) days of the delivery to the Interested Party. In the event that Addressee breaches Paragraph A or the Binding Provisions are terminated by the Interested Party pursuant to Paragraph F(ii) below and, within (_,) months after such breach or termination, Addressee closes a transaction relating to the transfer of a material portion of the ownership of Addressee or the Property through purchase, merger or other business combination then, immediately upon such closing, Addressee shall pay or cause to be paid to the Interested Party the sum of $_________.

C. Consents.

Both parties hereto will cooperate with one another and proceed as promptly as reasonably practicable, to prepare and file or submit all necessary requests for consents and approvals from lenders, landlords, governmental entities with jurisdiction, and other parties in interest whose consent or approval is applicable to this transaction, and to use their best efforts to comply with all other legal or contractual requirements or conditions to the signing and completion of the Contract. The only parties with the right of consent to the Interested Party's agreement are: __________, __________, and __________. The only parties with the right of consent to Addressee's agreement are __________, __________, and __________. The signatories hereto shall submit to the owners and directors who have the duty to review and approve the same, the Letter with a request for approval and supporting efforts to obtain the approval, shall continuously and diligently pursue of approval until it is obtained or refused, shall regularly advise the other party of the status of the approval process, and shall use the most efficacious and expedient procedures to obtain approval.

D. Expenses.

Each party hereto shall bear its own expenses incurred in connection with the negotiation of this letter, the preparation of the final and formal contract, the investigations performed during the
Investigation Period (defined below), and obligations provided under the Binding Provisions. *Any materials generated for the Interested Party's benefit in connection with its analysis of the Property shall be delivered to Addressee if Closing under the Contract does not occur [upon Addressee's payment to the Interested Party of ____ percent cent of such costs.]* If this letter is terminated by Addressee for reasons other than due to the Interested Party’s default, Addressee shall reimburse the Interested Party for its costs to the appraiser of $_______, the environmental consultant of $_______, and physical inspection of $_______, and such amounts shall be Addressee’s sole liability to the Interested Party at law or in equity.

E. **Termination.**

The Binding Terms shall remain in effect until the earlier of (i) the signing and delivery by both parties of the final and formal Contract, or (ii) the failure to have such signed final and formal Contract prior to the Effective Date above, or (iii) any mutually agreed upon extension or termination of that period, or (iv) prior to the Effective Date, if a material change or event makes the signing and delivery of the Contract illegal, invalid, or a violation of the fiduciary duties of the owners or directors of the Interested Party or Addressee ("Letter Termination"). Notwithstanding any Letter Termination, the provisions of the Binding Terms of A, C, F, G and H will survive such Letter Termination.

F. **Merger.**

The Binding Terms are the entire agreement of parties with respect to them, and no other representation, promise, agreement, or condition shall be binding upon the parties unless set forth in writing signed by an authorized representative of the party to be bound, stating its intent to be bound.

G. **Choice of Law.**

This letter shall be deemed to have been negotiated, made, signed and delivered in the State of ____________, such that the substantive laws of such state govern the enforcement and interpretation of this Letter. The courts of ________________ shall have exclusive jurisdiction over all controversies related to this Letter, and the parties hereto waive any other venue to which they might
otherwise be entitled whether based on domicile, principal office, residence, nexus relationships, or otherwise.

H. Confidentiality.

Any information delivered or disclosed by one party to the other party which is not otherwise public, known to such party, or independently developed or received by such party shall be held as proprietary and confidential information and shall not be disclosed for ____ years to any third party other than to evaluate the interest in the proposed transaction. Such information shall be treated with the same standard of confidentiality as the receiving party treats its own confidential information, and shall be returned if no final, definitive and formal contract is consummated in accordance with this letter. Each party will, in good faith, attempt to restrict such confidential information only to those parties who have a need to know, in order for such party to conduct its usual course of business as it respects the sale/lease of the Property. Parties who need to know may include officers and directors of such party and its employees, as well as respective lenders, consultants and professionals retained by such party. In addition, the information may be disclosed to possible partners or venturers, if such party intends to seek partners or venturers, as well as underwriters and governmental or regulatory agencies to which the information must be disclosed by law, and also may be introduced or filed in litigation or similar proceedings.

I. Publicity.

Neither party hereto shall release any notice to the public regarding the subject transaction except (i) in form and content as jointly agreed upon, (ii) such ordinary communications to their owners, employees, lenders, regulators, and other parties who by law are entitled to such information, and (iii) such other disclosures as are required by law.
II. NON-BINDING TERMS.

Under this Section II, the following terms are non-binding and suggestive rather than agreed upon final and formal terms, they are expressly intended and deemed not to constitute the necessary materials terms to an agreement nor a final, enforceable and formal contract, nor a commitment by the parties hereto to be required to negotiate or use any efforts to negotiate to resolve any agreement:

A. Purchase/Lease.

The Interested Party shall purchase/lease and Addressee shall sell/let the Property on terms and conditions to be set forth in the final, enforceable and formal Contract. The Property will include the land, buildings, parking spaces, curb cut access to, on and off site improvements serving them, and personal property used in connection with them ("Property"), such as leases, contracts as acceptable to the Interested Party, computer data, and escrows.

B. Price/Rent. $__________.

C. Deposit.

At the commencement (expiration) of the Inspection Period (as defined below) the Interested Party will deliver its (initial) down payment of Down Payment Amount (the "Down Payment") to an escrow agent of the Interested Party’s choice (the "Escrow Agent") (at the expiration of the Inspection Period, the Interested Party will deliver an additional Down Payment of $ to the Escrow Agent.) The Escrow Agent shall deposit the checks in a separate FDIC insured, interest bearing account.

D. Inspections.

The Interested Party’s obligation to close shall be subject to the Interested Party’s reasonable satisfaction with the physical condition, local market conditions, projected tax and insurance costs, documentation and financial information of the Property, based on inspections to be made within days
from the date of the Effective Date ("Inspection Period"), including but not limited to inspection of the Property, evidence of satisfactory compliance with local laws, title, and contractual obligations, review of the building plans, and environmental inspections, with such conditions to be maintained through closing.

E. **Access.**

Addressee shall provide the Interested Party with full access to the Property and to Addressee's records, upon prior reasonable notice and during business hours. In addition, within ten (10) days after Addressee signs this letter [or the Contract], Addressee shall provide to the Interested Party with all documents and information in Addressee's control relevant to such inspection, including environmental reports relative to hazardous substances or any other adverse environmental conditions of the Property; appraisals; market studies; reports on the physical condition of the Property; leases and tenant correspondence files; violation notices of laws, title restrictions or contracts; utility and zoning letters; tax bills and assessments; service and repair records; permits and licenses; service and employment contracts, and such other documents as the Interested Party may reasonably request. *The Interested Party acknowledges that Addressee makes these materials available to the Interested Party without representation, warranty or recourse as to whether they are true, correct or complete, or their sufficiency for the Interested Party’s purpose. The Interested Party shall take reasonable efforts to avoid unnecessary disruption of Addressee’s business and that of Addressee’s tenants.*

F. **Inspection Termination.**

During the Inspection Period, the Interested Party shall have the right to terminate the Contract for any reason at all related to the Interested Party's dissatisfaction with its inspection *(i) which would cost more than $________ to correct, (ii) which would interfere with the Interested Party’s intended use of the Property, (iii) which the Interested Party did not know of prior to the Letter Effective Date.*
G. Financing.

The Interested Party’s obligations under the contract to purchase the Property is subject to the Interested Party obtaining financing reasonably satisfactory to it by delivery of a commitment in an amount no less than ___% of the purchase price, for a term of no less than ___ years, at an annual interest rate of no more than ___%, on a limited-recourse basis, for fees of no more than ___ %, or on more onerous terms to the Interested Party as may be satisfactory to it in its sole discretion. The Interested Party shall make application within five days after the Effective Date, and if the Interested Party has not obtained such commitment within the Inspection Period, Addressee may make application on behalf of the Interested Party or commit to provide such financing by extending purchase money mortgage loan credit on the foregoing terms, subject to standard lending requirements of institutional lenders in the area where the Property is located.

H. Escrows/Indemnities.

Addressee shall indemnify, protect, defend, and hold harmless the Interested Party against undisclosed or undiscoverable liabilities, breaches and misrepresentations of warranties, covenants and agreements by Addressee, which shall be supported by an escrow in the amount of $_____, provided, however, Addressee's liability shall be limited to such escrow, shall expire upon the transfer of the Deed to the Interested Party, shall be paid after settlement or final court order and expiration of applicable appeal periods of such claim. Addressee shall not be liable for matters which are either outside of Addressee's control, which the Interested Party knew, or which the Interested Party could have discovered with reasonable diligence during the Inspection Period.

I. Representations and Warranties.

The Contract shall contain such representations, warranties, covenants, conditions, and other terms and provisions as [the parties may agree upon][the Interested Party has customarily obtained in similar transactions][are traditionally contained in contracts for transactions described herein][follows:]

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J. Closing.

Within __ ( __ ) days after the expiration of the Inspection Period, Addressee shall transfer good and marketable title to the Property free and clear of all exceptions objected to by the Interested Party within the Inspection Period. Income and expenses will be prorated as of the day preceding Closing. If Addressee cannot so transfer title, the Interested Party may terminate the Contract and Addressee's return of the Interested Party's Deposit [together with an amount equal to the Interested Party's actual costs related to the transaction for third party expenses evidenced by receipts acknowledged by them as paid up to an aggregate amount of $ __________.] 

K. Title.

[Addressee] [The Interested Party] shall be responsible for the [delivery] [receipt] of a title report within ten (10) days after the Effective Date, and at closing, an owner’s title policy, at the cost of [Addressee] [the Interested Party] subject only to those exceptions approved by the Interested Party and the Interested Party’s lender, if any or to which the Interested Party concluded by the end of the Inspection it had no continuing objection. Addressee, and the Interested Party, in equal shares, shall at the cost of Addressee and the Interested Party, in equal shares, pay any deed, document and similar intangible tax attributable to the transfer of the deed. Addressee and the Interested Party, in equal shares, shall pay any transfer tax. The Interested Party shall pay any mortgage tax on the Interested Party’s mortgage. Addressee, at the cost of Addressee and the Interested Party, in equal shares, shall also be responsible for delivery within ten (10) days after the Effective Date of an "as built" ALTA/ACSM survey of a Class appropriate for the Property reasonably acceptable to and certified to the Interested Party and the Interested Party’s lender, if any, if in Addressee’s possession.

L. Assignment.

The Interested Party, at its sole discretion, will have the right to assign all rights in the Contract or acquire title in the name of a subsidiary or affiliate, so long as the Interested Party remains liable for the obligations under the Contract, and such assignee shall become the Interested Party under the Contract and the grantee of the legal title.
M. Brokers.

Addressee shall pay Broker's Name and Company its commissions in connection with this transaction. Addressee shall indemnify the Interested Party from claims of any party to a commission.

If the foregoing is satisfactory, please approve by having a copy of this letter duly signed where indicated below and returned to me on or before Expiration Date [the tenth (10th) day after the date above.] This letter may be signed in counterparts and delivered by telecopy facsimile transmissions, all of which shall be deemed an original and one and the same letter, notwithstanding each party may not have signed each counterpart and such signatures may be telecopy facsimiles rather than handwritten originals.

Sincerely,

The terms of the foregoing letter are hereby approved.

Title:

Authorized Signatory for Addressee:

Date:
BIBLIOGRAPHY

1. Broadwin, David, "How to Draft Letters of Intent for Business Acquisitions (with forms)," 37 The Practical Lawyer 13, (March 1991)


7. Ominsky, Harris, "Counseling the Client on "Gentlemen’s Agreements"", 36 The Practical Lawyer 24 (Dec. 1990)


1. Knapp, Charles L., "Enforcing the Contract to Bargain", 44 NYU Law Rev. 673, 675, "...for a common law lawyer, characterizing a particular negotiation situation is likely to be a choice between two alternatives -- contract or no contract."

2. V'Soske v. Barwick, 404 F.2d 495, 499 (2nd Cir. 1968), cert. denied, 394 U.S. 921, 89 S. Ct. 1197, 22 L.Ed. 2d 454 (1969), "First, if the parties intend not to be bound until they have executed a formal document embodying their agreement, they will not be bound until then; and second, the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event." Pennsylvania Co. v. Wilmington Trust Co., 166 A.2d 726, (Ch. Ct. 1969), aff'd. 172 A.2d 63 (Del. Sup Ct. 1961) in denying summary judgment, where a letter of intent stated the parties' agreement was subject to preparation of a formal agreement, the court concluded that intent was sufficiently unclear that additional evidence was admissible.

3. Skycom Corp v. Telstar Corp., 813 F.2d 810, 817 (7th Cir. 1987), the court in affirming the lower court's dismissal of claims, construed a letter which characterized itself as "an agreement in principle," and which contained six contingent conditions, as well as references to a future "formal agreement," and held that such an agreement in principle was, by law, not binding.

4. Chrysler Capital Corp. v. Southeast Hotel Prop., 697 F. Supp. 794, 797-801 (S.D.N.Y. 1988) holding that a preliminary agreement had been achieved despite the lack of a signature by the borrower, even where it was characterized as "not a commitment but rather a proposal which outlines the terms and conditions which will form the basis for a commitment. . . ." and required the proposed borrower to "execute the enclosed copy of this letter acknowledging their acceptance. . . ." The court reasoned the parties acted as if, and by other writings believed that, it had been signed. The court went farther, however, to confirm that it was merely a preliminary agreement to enter into a commitment, and not itself an accepted commitment, let alone a final contract.

5. Pinnacle Books, Inc. v. Harlequin Enterprises Limited, 519 F. Supp 1181, 121 (S.D.N.Y 1981), holding that an agreement to negotiate "using best efforts" is unenforceable for indefiniteness unless the agreement elaborates a clear set of guidelines by which the parties' efforts can be measured. The court renounced a prior decision which held that an agreement to negotiate with best efforts was actionable, unlike an agreement to agree. Cain v. United States Testing Company, Inc., 1994 WL 564670 (N.D. Cal) 44 at 46 in rejecting the enforceability of agreements to negotiate and agreements to agree, the court stated that "under California law an agreement for future negotiations is not the functional equivalent of a valid agreement . . . Furthermore, the court finds any distinction between an agreement to agree and an agreement to negotiate a future agreement to be disingenuous. . . ."
6. **Channel Home Centers Division of Grace Retail Corporation v. Grossman**, 795 F.2d 291 (3rd Cir. 1986) the court reversed the lower court dismissal of claims for breach of contract, because the breach was of the agreement to negotiate in good faith, not the agreement to lease. In this case, the landlord and tenant executed a lengthy letter of intent.

7. **Runnemede Owners, Inc. v. Crest Mortgage Corporation**, 861 F.2d, 1053, 1056 (7th Cir. 1988) affirming the lower courts dismissal of a claim for breach of contract by a lender under a letter of intent to lend money, stating a letter of intent is only "to provide the initial framework from which the parties might later negotiate a final . . . agreement, if the deal works out."

8. **Skycom** at 817, holding that both plaintiff and defendant were wrong in the belief that the agreement in principle was either binding or not binding as to all its provisions, because particular provisions may bind under the doctrine of promissory estoppel.

9. **Tribune Co.**, at 497 stating that courts should be careful not to trap parties into contracts they never intended. See **California Food Service Corp. v. Great American Ins. Co.**, 130 Cal. App. 3d 892, 897, 182 (Cal. Reptr. 67, 70 (1982) holding that an operator of a restaurant location had an insurable interest in the premises, where a letter of intent's conditions for a final binding lease had not been met, including payment of the consideration; **City of Santa Cruz v. MacGregor**, 178 CA.2d 45, 2 Cal Rptr. 727 (1960) holding that an operator of a location had an interest in property for purposes of condemnation awards, where the operator signed a letter of intent which required a lease to be subsequently executed after completion of a to-be-built building, and the operator took possession of the building below its competition, without executing a lease, but paying rent for the following two years.

10. **Reprosystem, B.V. v. SCM Corp.**, 727 F.2d 257, 262 (2nd Cir. 1984) overruling the lower court decision that as a matter of fact a contract was made by a series of negotiations starting with a meeting, then proceeding to a simple letter offering a purchase price subject to execution of a final agreement, then an "agreement in principle", then drafting a formal agreement to final executable form, and finally written notice that the agreement was in final form subject to government approval and final signing, the higher court reasoned that no contract existed because at all times the parties intended to be bound only after execution of formal contracts, as shown by (1) the first letter of proposal, (ii) the public press releases, (iii) the condition in the final agreements for authorization, execution and delivery of the agreements to be binding, as well as (iv) the exchange of legal opinion letters that the agreements are binding. This result embraces the doctrines of freedom of contract over the
principle of good faith requiring that a negotiation cannot be revoked for reasons unrelated to the negotiation.

11. *Skycom* at 814, stating, "'intent' does not invite a tour through Walters' [plaintiff's] cranium, with Walters as the guide," but instead, is derived from the words and actions of the parties. *Rand-Whitney Packaging Corp. v. The Robertson Group, Inc.*, 651 F. Supp. 520, 534-535 (U.S.D.C. Mass. 1986) stating, "I accept that Mr. Grieb in his mind may have considered the letter to be a letter of intent. That does not alter the conclusion that he intended the parties to be bound by it." *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1009 (3rd Cir. 1980) stating, "It would be helpful if judges were psychics who could delve into the parties' minds to ascertain their original intent. However, courts neither claim nor possess psychic power. Therefore, in order to interpret contracts with some consistency, and in order to provide contracting parties with a legal framework which provides a measure of predictability, the courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent. As Justice Holmes observed:

'[T]he making of a contract depends not on the agreement of two minds, in one intention, but on the agreement of two sets of external signs -- not on the parties' having meant the same thing but on their having said the same thing.' Holmes, The Path of the Law, in Collected Legal Papers 178. See also *Clardy*.

12. *Arcadian Phosphates, Inc v Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir 1989). The court upheld the dismissal of a claim to enforce a memorandum of understanding, applying the doctrine that the "language of agreement is the most important [factor in determining intent]." In this case, significant negotiations resulted in a complex and detailed memorandum which still suffered certain omissions dealing with purchase money financing terms and future equity participation "to be subject to mutual agreement." The court found the memorandum revealed that at least one of the parties did not intend to be bound. The court, as with most New York cases on letters of intent, referred to and invoked the authority of *Tribune Co.* with approval. *Fruitico S.A. de C.V. v. Bankers Trust Company*, 833 F. Supp. 288, 298 (S.D. N.Y. 1993) in ordering a summary judgement dismissal of claims against the financier for alleged breach of a sequence of term sheets to provide debt or equity financing, the court held that when written draft agreements state that a condition precedent to enforceability is execution and delivery of final documents, unsigned drafts are not enforceable. *Runnemede Owners, Inc. at 1056*, the court concluded that the intent of the parties that a contract would not arise without
further consideration and formal execution was made express in the letter to eliminate misunderstandings.

13. Melo-Sonics Corporation v. Cropp, 342 F. Supp. 856, 859-860 (3rd Cir. 1965), the court reversed the dismissal of a complaint for failure to state a cause of action, in the circumstance of letters and meetings to formalize "a preliminary agreement along the lines previously discussed" having been broken off, because a trier of fact might find that the parties had settled on the essential terms with the only remaining act being the formalization of the agreement. American Cyanamid Co. v. Elizabeth Arden Sales Corp., 331 F. Supp. 597 (1971), in which the court did not dismiss for failure to state a cause of action, in the circumstance of a signed letter which only omitted representations and warranties, a closing date, escrow conditions, and accounting principles to verify net worth, because there were sufficient essential elements to act as an offer which would be binding upon acceptance. Rand-Whitney Packaging Corp. at 535, stating the language contemplating a future agreement did not mean the parties believed they were still at the stage of preliminary negotiations, but rather that the agreement had been reached, but would have to be formalized to be consummated. Tamir v. Greenberg, 119 A.D.2d 665, 501 N.Y.S.2d 103, 105 (A.D. 2 Dept. 1986), the court dismissed claims for damages or specific performance where a letter signed by both parties required a formal contract to be prepared in 10 days, because the parties orally agreed the obligations were subject to binding commitment to a prior buyer.

14. Clardy Manufacturing Company v. Marine Midland Business Loans, Inc., ___ F. Supp. ___ (USND of Texas, Fort Worth Division 1995) in holding that a bank was obligated to fund a loan based on a term sheet letter which stated "THIS PROPOSAL IS NOT A COMMITMENT TO LEND", the court concluded that phrases such as "would consider" and "would require" created a contract where lender’s satisfaction as a precondition was limited by an objective reasonableness standard. APCO Amusement v. Wilkins Family Restaurants, 673 S.W. 2d 523, 528 (Tenn. App. 1984) stating, "The letter of intent is worded much like a contract. The instrument speaks through words such as 'agrees,' 'acceptance' and 'accepts.'" Arnold Palmer at 589 emphasized that the unqualified use of imperatives like "will" and "shall" created a possibility that the requirement for a subsequent writing was merely a memorialization of an existing agreement.

15. Mississippi & Dominion Steamship Co. v. Swift, 29 A. 1063, 1067 (Me. 1894) reviewed a broad range of opinions, primarily from England, in coming to the decision that a contract had not been formed where the two parties had agreed to proceed with the transaction, but wanted further drafting of the formal contract, which never occurred. The court stated,
"If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.

In determining which view is entertained in any particular case, several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing, whether it is of such nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.

Still, with the aid of all rules and suggestions, the solution of the question is often difficult, doubtful and sometimes unsatisfactory."

The Mississippi & Dominion Steamship Co. case was approved and its test refined by R.G. Group, Inc. v. Horn & Hardart Company, 751 F.2d 69, 75 (1984). In a decision by Judge Pratt upholding the lower court’s summary judgment for dismissal, the court reiterated its support of the doctrine that"...when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent." Winston v. Mediafare Entertainment Corporation, 777 F.2d 78, 80 (2nd Cir. 1985) held, in a subsequent opinion written by Judge Pratt reversing a lower court’s holding, he held that the parties intended to be bound prior to executing a final written agreement. Where a number of letters were exchanged, none of which expressly reserved the right to be bound, was found by the Court to exist from other circumstances. See also P.A. Begner & Co. v. Martinez, 823 F.Supp. 151, 156 (S.D.N.Y. 1993) stating that parties can make an oral "agreement to agree."

Terracom Development Group, Inc. v. Coleman Cable and Wire, 365 NE 2d 1028, 1031-1032 (Ill. 1977) in affirming the lower court’s judgment that no contract existed from a series of letters which ended with a letter which contained an express disclaimer of any contract arising prior to a formal agreement, the upper court pursued a relatively common taxonomy of analysis: First, whether the writing is ambiguous is a question of law; second, if it is not ambiguous, the intent of the parties is determined solely, from the writing; third, if the writing is ambiguous, parole evidence and extrinsic circumstances can be introduced -- in
either instance, intent is a question of fact. Empro Manufacturing Co., Inc. v. Balt. Co. Manufacturing, Inc., 870 F.2d 423, 425 (7th Cir. 1989) in an appeal from dismissal, the court approved the appellants position that a letter of intent's effect depends on the parties' intent, which is a factual issue; but disagreed with appellant by holding that "intent" is objective, not subjective, and discernible from the contract language if it is not ambiguous. The letter stated that it was subject to completion of a definitive agreement and to board approval. Anderson Chemical at 1578-1579 concluded that a writing was not intended as a contract to sell because (1) it required a further negotiation and execution of a definitive contract, (2) subsequent approval by buyer and seller's boards of an identified contract which had not been completed.

17. Hoffman v. Red Owl Stores, Inc., 133 N.W. 2d 267 (1965) in which the court upheld a lower court award of damages to the prospective buyer of a business where, even though final terms were unresolved, the seller induced the buyer to adversely change the buyer's position. Another interpretation of the case was that it provided damages for a failure to negotiate in good faith. See Knapp at 688.

18. Protocomm Corp. v. Fluent, Inc., 1995 WL 3671 (E.D. Pa.) 25 at 37 concludes "in Pennsylvania, an agreement is enforceable where the parties intend to conclude a binding agreement 'and the essential terms of the agreement are certain enough to provide a basis for an appropriate remedy' . . . " (references omitted). The court also cited with approval Restatement (Second) Contracts §33 and Uniform Commercial Code §2-305 for the proposition that agreements lacking material terms other than time and price may still be binding. In SKD Investments, Inc. v. Ott, 1996 WL 69402 (E.D. Pa.) 2 at 9, the court limited the acceptable criterion for missing elements to be only those that are non-essential terms.

19. Skycom at 816 distinguishes between a sophisticated corporate merger, where a court would expect a formal writing, and a routine lease under a pre-printed form, where a court would not expect the letter agreement to bind because the "boilerplate" agreement merely memorializes the agreement already made.

20. Anderson Chemical Co., Inc. v. Portals Water Treatment, Inc., 768 F.Supp. 1568, 1578 (M.D. Ga. 1991) upholding summary dismissal of claim that letter of intent was an enforceable contract, because, the court concluded, though some parts of the letter create independent obligations, those obligations are not the same as a contract to sell. Skycom at 817, holding that both plaintiff and defendant were wrong in the belief that the agreement in principle was either binding or not binding as to all its provisions, because particular
provisions may bind under the doctrine of promissory estoppel. Budget Marketing at 425, held that a letter of intent would not be generally binding where it provided a general disclaimer but would be binding as to a special exception, in this case a confidentiality provision to the general disclaimer.

21. Arcadian Phosphates, Inc v Arcadian Corp, 884 F.2d 69, 72 (2d Cir 1989). The court upheld the dismissal of a claim to enforce a memorandum of understanding, applying the doctrine that the "language of agreement is the most important [factor in determining intent]." In this case, significant negotiations resulted in a complex and detailed memorandum which still suffered certain omissions dealing with purchase money financing terms and future equity participation "to be subject to mutual agreement." The court found the memorandum revealed that at least one of the parties did not intend to be bound. The court, as with most New York cases on letters of intent, referred to and invoked the authority of Tribune Co, with approval. Frutico S.A. de C.V. v. Bankers Trust Company, 833 F. Supp. 288, 298 (S.D. N.Y. 1993) in ordering a summary judgement dismissal of claims against the financier for alleged breach of a sequence of term sheets to provide debt or equity financing, the court held that when written draft agreements state that a condition precedent to enforceability is execution and delivery of final documents, unsigned drafts are not enforceable. Runnemede Owners, Inc. at 1056, the court concluded that the intent of the parties that a contract would not arise without further consideration and formal execution was made express in the letter to eliminate misunderstandings.

22. Channel Home Centers at 299, stating that the letter of intent language that the landlord would "only negotiate the above-described leasing transaction to completion" was a contract to negotiate in good faith. Itek Corporation v. Chicago Aerial Industries, Inc., 248 A.2d 675, 629 (Del. 1968), the court held a trier of fact might find that the letter of intent requirement to negotiate in good faith was breached, or that the letter of intent was a binding contract of sale. Philmar Mid-Atlantic v. York St. Assoc., 566 A.2d (Pa. Super. 1989) 1253, 1255 dismissing a claim for breach of duty to negotiate in good faith, because there was no agreement or mutual manifestation to be bound to negotiate. Racine & Laramie, Ltd. Inc. v. California Department of Recreation and Parks, 14 Cal Rtr. 2nd 335, 339, 11 Cal. App. 4th 1026 (1992) where the upper court reversed a lower court decision that the landlord had an obligation to negotiate for the extension and modification of a tenant’s rights to lease. The upper court based its decision on (1) the principle that the implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation, and (2) the implication of good faith is to protect the explicit covenants, not a general public policy. Jenkins v. County of Schuylkill, 658 A.2d 380 (Pa. Super. 1995) held that the prospective tenant’s characterization of the plaintiff as the "prime candidate" and several meetings for
which plaintiff continually was asked and did revise proposed plans did not together meet the three part test to establish a cause of action for breach of good faith negotiations.

23. Frutico at 300, stating that parties can bind themselves to negotiate in good faith, but without an agreement, there is no duty. Channel Home Centers at 299, stating an agreement to negotiate in good faith ... is an enforceable contract. Itek Corp. v. Chicago Ariel Industries, Inc., 248 A.2d 625, 629 (1968), stating "[I]t is apparent that the parties obligated themselves to "make every reasonable effort" to agree upon a formal contract, and only if such effort failed were they absolved from 'further obligation' for having 'failed' to agree upon and execute a formal contract."

24. Budget Marketing, Inc. v. Centronics Corp., 927 F.2d 421, 425 (8th Cir. 1991) the higher court sustained a lower court ruling dismissing the claim of breach of an agreement to negotiate in good faith, where the letter of intent included a formal written contract condition, concluding that the presence of that condition meant there was no intent to be bound.

25. A/S Apotheke ines at 159 stating, "the implied duty of good faith and fair dealing in the performance of a contract ... must be distinguished from the duty to negotiate in good faith that arises from a preliminary letter of intent."

26. Phoenix Mutual Life Insurance Company v. Shady Grove Plaza Limited Partnership, 734 F. Supp. 1181, 1190 (D.Md. 1990) holding that where the defendant executed a letter of intent requiring it to negotiate in good faith from mutually acceptable provisions as were agreed to in another project between plaintiff and defendant, the defendant was not liable for refusing to agree because "refusing to budge is hardly an indication of bad faith."

27. Schwanbeck v. Federal-Mogul Corp., 578 N.E. 2d 789, 795 Mass. App. Ct. 1991) stating, "good faith means something less than unremitting efforts to get to "yes," with the players at all times playing their cards face up. Rather the obligation means that preliminary agreement has not been entered into for some ulterior purpose, such as to set up the proposed buyer from the outset as a stalking horse for another buyer, or to satisfy a creditor that steps to transform an asset into cash are actually under way."

29. A/S Apothekernes at 159. Tribune Co. at 500, however, states that if it is determined that the parties intended to be bound by the letter, then the presence of a reservation for approval by counsel, the board, or final documents in approved form does not "free a party to walk away from its deal merely because it later decides that the deal is not in its interest."

30. Numerous cases turn on whether the requirement of board of director approval is meaningful. A/S Apothekernes Laboratorium v. I.M.C. Chemical Group, Inc., 873 F.2d 155, 156 (7th cir. 1989), specifically distinguishes that even having satisfied the requirement to negotiate in good faith, and the achievement of a meeting of the minds, a contract did not exist prior to compliance with the reservation for board of director approval. Some turn on approval by the principal of an agent's acts. Philmar Mid-Atlantic v. York St. Assoc., 566 A.2d 1253, 1255 (Pa. Super. 1989) in dismissing a claim for breach of contract under a letter of intent to lease premises, the court concluded there was no mutual assent where one condition was the approval by the landlord of its agent's proposal, and its approval of a final lease. But Tribune Co. at 500 upheld the duty to negotiate, even if final board approval was a condition to a final contract. Clardy at 9 rejected the disapproval of a senior underwriter because a loan officer of lesser authority had granted an approval.

31. A/S Apothekernes at 156, states that completion of negotiations does not impose a duty on the negotiator to advocate the letter of intent position, where approval by a final authority is a condition of enforceability.

32. VS&A Communications Partners, L.P. at 68, stating: "Negotiators can create certain binding protections against the risk that moving markets present. They can, for example, negotiate binding provisions with respect to transaction cost reimbursements before they reach agreement on the transaction itself."